

Issues: Qualification – Management Actions (Recruitment/Selection) and
Discrimination (Race); Ruling Date: February 20, 2009; Ruling #2009-2160;
Agency: Department of Professional and Occupational Regulation; Outcome:
Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Professional
and Occupational Regulation
Ruling No. 2009-2160
February 20, 2009

The grievant has requested a ruling on whether her August 14, 2008 grievance with the Department of Professional and Occupational Regulation (DPOR or the agency) qualifies for a hearing. For the following reasons, this grievance qualifies for hearing.

FACTS

The grievant is currently employed with the agency as an Administrative and Office Specialist III. In 2008, she was an unsuccessful candidate for one of three available positions as a regulatory investigator with the agency, failing to be selected as one of the eight candidates interviewed. On August 14, 2008, the grievant initiated a grievance to challenge this selection process, asserting that she is more qualified than at least one of the successful candidates. Having failed to resolve the grievance during the management steps, the grievant now seeks qualification of her grievance for hearing.

DISCUSSION

By statute and under the grievance procedure, complaints relating solely to issues such as the methods, means, and personnel by which work activities are to be carried out, as well as hiring, promotion, transfer, assignment, and retention of employees within the agency "shall not proceed to hearing" unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.¹ In this case, the grievant essentially claims that the agency misapplied policy during the selection process and discriminated against her on the basis of her race.

¹ Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

Misapplication of Policy

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”² Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.³ An adverse employment action is defined as a “tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”⁴ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁵ By not being selected for the position, it would appear that the grievant suffered an adverse employment action.

DHRM Policy 2.10 provides that an “agency must screen positions according to the qualifications established for the position and must apply these criteria consistently to all applicants.”⁶ In the job announcement for the regulatory investigator position at issue, the agency set forth these minimum qualifications:

Ability to analyze, verify, investigate and research information. Ability to interpret and appropriately apply facts to complex statutes, rules, and regulations. Ability to accurately document investigative findings. Strong oral and written communication skills. Excellent organizational skills and ability to handle multiple tasks. Excellent personal computer, word processing and proofreading skills. Ability to work independently with limited supervision. Commitment to customer service with the ability to interact with the general public, agency staff, and members of other departments and agencies.

² See *Grievance Procedure Manual* § 4.1(b).

³ While evidence suggesting that the grievant suffered an “adverse employment action” is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an “adverse employment action.” For example, consistent with recent developments in Title VII law, this Department substitutes a lessened “materially adverse” standard for the “adverse employment action” standard in retaliation grievances. See EDR Ruling No. 2007-1538.

⁴ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁵ See, e.g., *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

⁶ DHRM Policy 2.10, *Hiring*. The policy further defines “screening” as “[t]he process of evaluating the qualifications of individuals in an applicant pool against established position qualifications to determine: which applicants in the pool meet minimum qualifications; and which of the qualified applicants an agency wishes to interview.”

In addition, the agency identified these “preferred” qualifications for the regulatory investigator position:

Graduation from a college or university with emphasis in Law, Paralegal, Criminal Justice or related field and/or equivalent investigative experience. Knowledge of DPOR and CID policies and procedures. Experience in a regulatory and/or detailed investigations environment with progressive responsibility is desirable.

In screening candidates for interviews, the agency applied the following seven criteria, each weighted equally and evaluated on a scale of “Strong,” “Satisfactory,” “Weak,” or “None”: (1) “Ability to analyze, verify, investigate and research information received”; (2) “Ability to interpret and appropriately apply facts to complex statutes, rules, and regulations”; (3) “Ability to accurately document investigative findings”; (4) “Excellent word processing and proofreading skills”; (5) “Ability to interact with the general public, agency staff, and members of other departments”; (6) “Ability to Multi-task and handle large workloads”; and (7) “Graduation from a college or university with emphasis in criminal justice, law enforcement, or related field and/or equivalent investigative experience.”

The grievant states that she was told by the agency that she was not selected for an interview “due to a large pool of ‘extremely qualified’ applicants.” When comparing the grievant’s application with the applications of those candidates chosen for interviews, however, it is unclear in some cases why the grievant received lower screening scores than candidates deemed more qualified. For example, both the grievant and Candidate S have bachelor’s degrees in criminal justice from accredited universities. Candidate S’s previous experience consists of a two month internship with a Juvenile and Domestic Relations Court and part-time sales experience with two retailers. In contrast, the grievant’s previous experience consists of her work for DPOR, which has included communicating daily with regulants, legal analysts and investigators regarding disciplinary cases and reviewing new and pending applications for compliance with regulations and statutes. In addition, the grievant has worked for another state agency as a “consumer counselor,” which apparently involved interviewing and counseling consumers on consumer laws to determine if investigation was warranted. In screening, Candidate S received a perfect score of “7,” while the grievant received a “4.” Similarly, Candidate P, who is working towards a Masters degree in Criminal Justice but whose work experience is limited to working as a temporary office assistant also received a perfect score of 7. Both Candidates S and P received interviews, while the grievant did not.

In light of these potential inconsistencies in the agency’s application of its screening criteria, the grievant has raised a sufficient question as to whether the agency misapplied policy by failing to apply screening policies consistently. We note, however, that this qualification ruling in no way determines that the agency’s actions in fact

violated policy, only that further exploration of the facts by a hearing officer is appropriate.

Alternative Theory

The grievant has also asserted that the agency discriminated against her on the basis of her race in failing to select her for an interview. Because the grievant's claim regarding the misapplication or unfair application of policy qualifies for hearing, this Department deems it appropriate to send all alternative theories and claims raised by the grievance for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

CONCLUSION

For the reasons set forth above, the grievant's August 14, 2008 grievance is qualified for hearing. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer using the Grievance Form B.

Claudia Farr
Director